

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

In re:)	
)	
NATURAL MOLECULAR TESTING CORPORATION,)	No. 13-19298
)	
Debtor.)	
)	
)	
NATURAL MOLECULAR TESTING CORPORATION,)	
)	
Plaintiff,)	
)	
vs.)	No. 13-01635
)	
CENTERS FOR MEDICARE and MEDICAID SERVICES, et al.,)	
)	
Defendants.)	

TRANSCRIPT OF THE DIGITALLY-RECORDED PROCEEDINGS
BEFORE THE HONORABLE MARC L. BARRECA
AUGUST 28, 2014

Transcribed by: Robyn Oleson Fiedler
CSR #1931

AHEARN & ASSOCIATES
ahearnandassoc@comcast.net

1 A P P E A R A N C E S

2

3 For the Defendants:

4 MS. CHRISTINA FOGG
5 U.S. ATTORNEY'S OFFICE
6 700 Stewart Street, Suite 5220
7 Seattle, WA 98101-1271
8 Phone: 206-553-4299
9 christina.fogg@usdoj.gov

10 For the Plaintiff:

11 MR. ARNOLD WILLIG
12 MR. CHARLES L. BUTLER
13 HACKER & WILLIG PS
14 520 Pike Street, Suite 2500
15 Seattle, WA 98101
16 Phone: 253-340-1935
17 arnie@hackerwillig.com
18 charlie@hackerwillig.com
19
20 and (telephonically)
21 MR. LAWRENCE J. FREEDMAN
22 MINTZ LEVIN COHN FERRIS GLOVSKY & POPEO
23 701 Pennsylvania Avenue N.W., #900
24 Washington, DC 20004
25 Phone: 202-434-7372
ljfreedman@mintz.com

For the Creditors Committee:

MS. JANE PEARSON
FOSTER PEPPER PLLC
1111 Third Avenue, Suite 3400
Seattle, WA 98101-3299
Phone: 206-447-4400
pearj@foster.com

For the Dept. of Health and Human Services:

MS. JANET FREEMAN

25

AHEARN & ASSOCIATES
ahearnandassoc@comcast.net

1 DIGITALLY RECORDED IN SEATTLE, WASHINGTON

2 AUGUST 28, 2014

3 --ooOoo--

4

5 MS. FOGG: Good afternoon, Your Honor.

6 Christina Fogg for the federal defendants.

7 MS. FREEMAN: And Janet Freeman on behalf of
8 Health & Human Services.

9 MR. WILLIG: Arnie Willig on behalf of
10 Natural Molecular, the plaintiff in this adversary
11 proceeding.

12 MR. BUTLER: And Charlie Butler, also on
13 behalf of Natural Molecular.

14 MS. PEARSON: Jane Pearson on behalf of the
15 committee.

16 THE COURT: All right. And remind me, did
17 the committee file a pleading on any of these? I know
18 you had your own motion, which you continued.

19 MS. PEARSON: We had our own motion which
20 we continued, Your Honor. And I simply wanted the
21 opportunity to make a brief statement indicating the
22 committee's support of the State's efforts in this
23 regard. Just to let the Court know, that one of our
24 concerns, with respect to the future of the case, has
25 to do with, ultimately, how some of these may play out.

AHEARN & ASSOCIATES
ahearnandassoc@comcast.net

1 So we're keenly interested and thought the trustee's
2 motion might be well considered later after the outcome
3 of these cases.

4 THE COURT: All right. I'll allow to you
5 make a limited statement.

6 MS. PEARSON: Thank you.

7 THE COURT: All right. Let's go back to what
8 -- first let me list what I have in motions and confirm
9 that I'm not missing anything, and then discuss how I
10 want to hear them. So I have a, in essence, renewed
11 motion to dismiss, but on the amended complaint. I
12 have the new motion to abstain or stay adversary
13 proceeding. Third, I have a motion to stay discovery
14 pending resolution of the motion for judgment on the
15 pleadings. And fourth, I have a motion for protective
16 order seeking to limit discovery to what discovery
17 would be if it were an administrative proceeding. And
18 that's it, right? Did I miss anything in there?

19 MS. FOGG: That's correct, Your Honor.

20 MR. FREEDMAN: Your Honor, do you want
21 telephone appearances by counsel as well?

22 THE COURT: I did, yes. Go ahead.

23 MR. FREEDMAN: Yeah, I apologize. Larry
24 Freedman for Natural Molecular, by phone.

25 THE COURT: All right. Thank you.

AHEARN & ASSOCIATES
ahearnandassoc@comcast.net

1 MR. DREW: And also, Your Honor, Richard Drew
2 from the Department of Justice.

3 THE COURT: All right. Are either of the
4 counsel on the phone going to be arguing any of the
5 motions?

6 MR. FREEDMAN: This is Larry Freedman. No,
7 Your Honor, I don't intend to. I'm there to
8 supplement, if necessary.

9 MR. DREW: Your Honor, it's the same for me.

10 THE COURT: All right. Let's chop them in
11 this order. I'm going to hear the motion to abstain or
12 for stay, then I'll hear the renewed motion for
13 judgment on the pleadings -- or in essence, what I'm
14 construing as renewed motion for judgment on the
15 pleadings -- and then I will hear the two discovery
16 related motions.

17 So let's hear the -- as a standalone motion,
18 let's hear the motion to abstain or stay proceedings.

19 MS. FOGG: Sure, Your Honor. I would start
20 by saying, I would like to apologize for overwhelming
21 the Court with four briefs. It was not meant to be a
22 burden. It was brought in this way because, as Your
23 Honor has noted in the past, it is a very unique
24 circumstance that we find ourselves in, and it is an
25 issue of great importance and precedent to the agency

AHEARN & ASSOCIATES
ahearnandassoc@comcast.net

1 and gets to the very relationship between the agency
2 and the courts. There are also significant practical
3 concerns at issue, and it was our hope that through
4 these four motions, we could present a number of
5 options to the Court that the Court could choose from
6 with due consideration to all of those interests.

7 THE COURT: And speaking of options, what is
8 the status of the motion to withdraw the reference?

9 MS. FOGG: As far as I know, it has been
10 fully referred to the district court. It was noted for
11 August 22nd, but we have not heard anything further
12 since that time.

13 THE COURT: Do you know who it's been
14 assigned to?

15 MS. FOGG: I believe it's been assigned to
16 Judge Lasnik.

17 THE COURT: All right. Go ahead.

18 MS. FOGG: Your Honor, the motion to abstain
19 or defer decision until after agency action was brought
20 in part at the suggestion of this Court for our last
21 hearing. It relates to the issue of even if this Court
22 finds that Town and Country provides that this Court
23 can exercise jurisdiction in this case, the question is
24 whether or not it should and whether or not it's
25 practical and helpful to all of the parties and this

AHEARN & ASSOCIATES
ahearnandassoc@comcast.net

1 Court for it to do so.

2 It's our position -- as we set forth in the
3 pleadings -- that because this involves such a
4 technical and complex issue of Medicare reimbursement
5 disputes, that it is better decided in the first
6 instance by the agency that has the processes, the
7 expertise, and the experience to do that.

8 If Your Honor is looking for an example of
9 what would be involved in the decision in the first
10 instance, I would refer you to the Exhibit A to the
11 reply in support of abstaining, which attached the
12 national and local coverage determinations that would
13 make up just one part of what would have to be decided
14 in the first instance, in other words, whether or not
15 each of these claims met those requirements.

16 In addition, if the Court does not choose to
17 abstain, there are a number of problems that it will
18 pose. First, there is a risk of duplicate effort. The
19 agency is moving forward with its first level review.
20 It has gotten through Universe 1 in its entirety and
21 has produced those results to NMTC. And those efforts
22 continue with respect to the other universes. This
23 Court would be, in essence, duplicating that effort by
24 trying to also decide, in the first instance, the
25 coverage determination. There is also, inherent in

AHEARN & ASSOCIATES
ahearnandassoc@comcast.net

1 that, a risk of inconsistent judgments if the agency
2 reaches one determination and this Court reaches
3 another.

4 But perhaps most significantly, there is the
5 problem of there not being a plan or precedent for how
6 this would be adjudicated in the first instance. And
7 in fact, I thought it was telling that NMTC's own
8 proposal in their response requires this Court to rely
9 upon the administrative record findings. In their
10 opposition at page 8, they said the bankruptcy court
11 need only review AdvanceMed's final report and apply
12 the law. They're essentially conceding that this Court
13 would not need to do a first level review and are not
14 suggesting that the Court should.

15 For that reason, abstention to March 6th is
16 warranted, because that is when we can represent that
17 all of the universes will be decided by an initial
18 determination at that time. Right now we only have
19 Universe 1 completed. I'm not sure if this is what
20 NMTC was arguing, but it seemed to me that in their
21 response they were arguing that we could somehow take
22 Universe 1 and extrapolate that out to the other
23 universes. I don't think that that is possible. Each
24 universe has its own distinct claims, patients, and
25 medical circumstances. And I think we need all of the

AHEARN & ASSOCIATES
ahearnandassoc@comcast.net

1 universes to be complete in order to have a first level
2 review to move forward from.

3 THE COURT: Let me ask -- I think you
4 answered this last time, but I've forgotten the answer.
5 Universe 1, the time frame for that is early enough
6 that you still have later claims that haven't had
7 review completed yet that are relevant to your claim,
8 as opposed -- the claim is based on what you've paid --
9 the Government's paid out already. At some point the
10 Government quit paying out, so then later claims after
11 that aren't really relevant to the claim determination.
12 They're only relevant -- I mean, they would be relevant
13 to the plaintiff debtor's claims, but they wouldn't be
14 relevant to the claim determination.

15 But am I correct, Universe 1 isn't the
16 universe, the complete universe, for those claims that
17 have to be reviewed for the claim determination; is
18 that correct?

19 MS. FOGG: I believe that's correct. That's
20 something I was clarifying just moments ago, and Janet
21 can correct me if I'm wrong. But my understanding is
22 that our claim 83 -- which currently represents the
23 unliquidated, undecided claim based on this
24 reimbursement dispute -- there are four universes of
25 claims within that. The first two are ones that were

AHEARN & ASSOCIATES
ahearnandassoc@comcast.net

1 already paid out to NMTC. And the issue is whether or
2 not it was an overpayment. Universes 3 and 4 are
3 predominantly ones that are currently held in suspense.
4 So they have not been paid out. So I believe Your
5 Honor's characterization is correct.

6 THE COURT: Okay. So the claim -- you have
7 two claims. The claim for the \$8 million, is that all
8 within Universe 1?

9 MS. FOGG: Yes.

10 THE COURT: Because otherwise, how could you
11 claim it, right?

12 MS. FOGG: Correct.

13 THE COURT: Do you know what that claim
14 number is? Just so I can keep these straight. Were
15 they sequential --

16 MS. FOGG: Sure. So 82 is the fully mature
17 liquidated claim. Claim 83 is the unliquidated claim
18 that represents this active Medicare payment dispute.

19 THE COURT: Okay. So I know you have your
20 other arguments, including jurisdictional, but in fact,
21 from the Government's side, what claim review needs to
22 be done for adjudication of what you called your fully
23 mature claim has been completed; is that right?

24 MS. FOGG: That's right.

25 THE COURT: Okay. Go ahead.

AHEARN & ASSOCIATES
ahearnandassoc@comcast.net

1 MS. FOGG: The other issue I wanted to
2 address in terms of seeking our relief for either
3 abstention or at least a deferral until March is the
4 claims from NMTC that this would be unfair because of
5 the delay that it would cause. I would note that,
6 first, NMTC has not provided a viable faster
7 alternative for resolution. In fact, their plan for
8 resolution also relies on the administrative record,
9 which would take until March to develop.

10 In addition, I wanted to note that Medicare
11 is a voluntary program, that participants know that
12 they're going to be subject to a variety of rules and
13 regulations. And they know that if there are credible
14 allegations of fraud, their claims will be held in
15 suspense. The Supreme Court has already weighed the
16 importance of the agency's careful review of Medicare
17 disputes against the delay that that process can cause
18 and has already found that careful review by the agency
19 is a more important virtue than that delay.

20 That is true even in the bankruptcy context.
21 There's case law that we cited in our brief that
22 includes the fact that providers who choose to
23 participate in Medicare do not have a guarantee of
24 solvency. That's especially true here where it is now
25 our understanding that NMTC is not reorganizing. They

AHEARN & ASSOCIATES
ahearnandassoc@comcast.net

1 are liquidating. By their claim -- or by, rather,
2 their pleading filed in the bankruptcy court at docket
3 number 351, on page 2, they state this they expect to
4 file a liquidating plan and/or motions to dispose of
5 the estate assets for the benefit of creditors to wind
6 down the affairs of the business and to liquidate
7 assets. So in this instance, delay is even more
8 insignificant.

9 In sum, Your Honor, abstention or deferral to
10 agency expertise is the most efficient way to move
11 forward to resolve this highly technical issue of
12 Medicare reimbursement eligibility.

13 That's all I have on this motion. I'm happy
14 to address the other ones if you like.

15 THE COURT: No, let's take them one at a
16 time. Okay. Thank you.

17 MR. WILLIG: Thank you, Your Honor. Arnie
18 Willig on behalf of the plaintiff, Natural Molecular.
19 I think that when you look at this case over all and
20 you realize that the Government suspended these funds
21 back in April of 2013, more than 18 months ago, they've
22 had plenty of time to do whatever sort of analysis or
23 claims review or internal probing of whether or not
24 these claims were medically necessary to fit in with
25 the current trial calendar that we have right now.

AHEARN & ASSOCIATES
ahearnandassoc@comcast.net

1 What they're really doing is essentially
2 gaming this system by saying this Court should not hear
3 any of these claims because we've come up with these
4 imaginary horrors. The Court's going to have to
5 listen to 17,000 claims and review medical records of
6 individuals who are part of the Medicare program.

7 In fact, that's not what this case was about
8 originally. The case was filed because the Government
9 stated that there were credible issues of fraud with
10 respect to -- I believe they pulled out at the time --
11 five files. Since then it has now morphed into this
12 claim that these tests were medically unnecessary and,
13 therefore, not reimbursable. And now as the case
14 evolves, they're saying, well, we need yet more time in
15 order to essentially develop our case in secret without
16 having the review of a litigant to the matter so that
17 we can examine whether or not what they're doing
18 comports with the claims that we've brought against
19 them.

20 The Government has been ordered, as of July,
21 to compel production of their documents. What they've
22 produced was, frankly, woefully incomplete. And if I
23 can hand up to the Court a brief summary, we received
24 -- after the motion to compel, we received -- if I
25 might hand this up to the Court, Your Honor?

AHEARN & ASSOCIATES
ahearnandassoc@comcast.net

1 THE COURT: You may.

2 MR. WILLIG: -- hundreds and hundreds of
3 pages of spreadsheets of this nature that are virtually
4 unreadable and really say nothing as to the nature of
5 the Government's dispute with these Medicare claims. I
6 mean, what the Government is doing is essentially
7 forcing this debtor into filing yet another motion to
8 compel production to say, we're here to get to the
9 bottom of why you're disputing these claims. We're not
10 here to be papered with useless spreadsheets that are
11 unreadable and then cast aspersions on the debtor by
12 saying, well, they knew that this was a voluntary
13 process, and they should follow the administrative
14 rules. I know we're kind of overlapping into a later
15 argument.

16 But the Ninth Circuit in Town and Country has
17 said this court has jurisdiction to hear this matter.
18 And that is still good law, and that's what we're
19 following. And that's what the Court should apply in
20 hearing this adversary.

21 THE COURT: All right. Thank you. All
22 right. Let's move on to the motion for judgment on the
23 pleadings.

24 MS. FOGG: Thank you, Your Honor. And I'm
25 happy to address those issues as well. I don't know if

AHEARN & ASSOCIATES
ahearnandassoc@comcast.net

1 you want me to spend any time in rebuttal before I move
2 on to the next --

3 THE COURT: Well, I don't need you to address
4 the issues regarding discovery because there's not a
5 motion to compel in front of me right now.

6 MS. FOGG: Okay. So on the 12(c) motion for
7 judgment on the pleadings, Your Honor --

8 THE COURT: I guess the focus would be, I can
9 understand why you would do this for preserving your
10 record, if you will. Is there anything extra on top of
11 it that is really uniquely raised by the amended
12 complaint that I should hear about?

13 MS. FOGG: We tried to make it not too
14 terribly boring for you to read a second time through.
15 There is a new focus of this motion for judgment on the
16 pleadings that I think was not as focused upon in the
17 original motion, which is not so much the issue of
18 whether or not Town and Country is good law or well
19 reasoned. It is the issue that Town and Country is
20 distinguishable from the circumstances here. And it's
21 distinguishable in a way that is very significant to
22 the issues we're talking about.

23 Town and Country involved a Medicare
24 reimbursement dispute that had already been resolved.
25 The issues was that that was going to be paid through a

AHEARN & ASSOCIATES
ahearnandassoc@comcast.net

1 promissory note and how that promissory note should
2 play in the bankruptcy. It's a very different
3 situation from here where the very essence of what
4 we're deciding in this adversary is whether or not the
5 amounts are properly payable under Medicare. And there
6 are reasons why that is an issue better left to agency
7 administration than --

8 THE COURT: But is there anything within the
9 Ninth Circuit's decision itself that said that was
10 critical to its decision? Any reason why it's saying
11 exhaustion would otherwise apply if it was this
12 original determination, but it doesn't now? Or are you
13 just saying that that's a logical distinction with the
14 facts?

15 MS. FOGG: It is a logical distinction, but
16 also it's difficult to get into the reasoning of the
17 court since it was put in, essentially, two lines at
18 the end of the decision. The decision primarily
19 focused on the issue of sovereign immunity, which is
20 not what is being argued here. So they gave us very
21 little record to work from. But from my perspective,
22 it relied on the issues of that case. And that case
23 did not have a Medicare payment dispute. It just had
24 an issue that touched upon Medicare, which I believe to
25 be different.

AHEARN & ASSOCIATES
ahearnandassoc@comcast.net

1 THE COURT: All right. Thank you.

2 MR. WILLIG: Thank you. Again, if the
3 Government had an issue with the Court's previous
4 rulings with respect to its denial of their motions to
5 dismiss, they could have filed a motion for
6 reconsideration and brought out what they considered to
7 be these new facts or distinguishable facts in Town and
8 Country that they're now bringing forth today.

9 The fact of the matter is there's nothing
10 distinguishable in Town and Country today versus back
11 then. Town and Country is very clear. The case states
12 that the exhausting provisions of the Medicare Act and
13 the Federal Tort Claims Act have no bearing on Town and
14 Country's claims because the independent grant of
15 jurisdiction to the bankruptcy courts set forth in 28
16 USC 157 and 1334, as well as the waiver of sovereign
17 immunity contained in 11 USC 106.

18 Now, Town and Country standing alone grants
19 jurisdiction to this Court to hear these Medicare
20 claims. Further, another independent source of
21 jurisdiction is the fact that the Government has
22 admitted that it filed two proofs of claim. Under the
23 Hong Kong-Shanghai Bank v. Simon case, again, another
24 -- which is 153 F.3d. 991 -- that served as another
25 independent bases for jurisdiction of this Court to

AHEARN & ASSOCIATES
ahearnandassoc@comcast.net

1 hear those claims. What the Government is trying to do
2 is say, well, that deals with the sovereign immunity
3 issue, and sovereign immunity is different than
4 jurisdiction. But in fact, they're one and the same.

5 This Court, under Town and Country, has
6 jurisdiction to hear Medicare claims. The Government,
7 filing its proof of claim, is essentially doing two
8 things, consenting to the jurisdiction of this Court
9 and waiving sovereign immunity. But the Government's
10 argument is is, well, we can waive sovereign immunity,
11 but this might not be the proper forum to hear that
12 dispute. It might be our administrative review process
13 that Medicare has set up. But that's not what the law
14 is. The law is this Court has jurisdiction and can
15 hear this adversary in its entirety.

16 And I suppose, to get back to the
17 administrative review process, that alone takes months
18 and months. I mean, right now it would take, from my
19 understanding, 26 weeks to get on the docket of an
20 administrative review court or panel before it would
21 even set a trial date. So we're talking years --
22 effectively, years and years into the future from when
23 the Government first suspended these Medicare payments.

24 The fact of the matter is is, the Government
25 broke this debtor's back by failing to pay it its \$15

AHEARN & ASSOCIATES
ahearnandassoc@comcast.net

1 million in receivables. Now what they're doing is
2 saying, well, the debtor might be filing a liquidating
3 plan, but it was -- the reason that the debtor's in
4 this spot today is because it is effectively cut off of
5 all payments by Medicare. And that's what we're here
6 to determine, whether or not the Government owes that
7 \$15 million to this debtor, and whether or not there
8 are other damages with respect to the Government's
9 essentially destroying this debtor's business
10 operations.

11 Your Honor, there's no reason to again
12 revisit this issue of jurisdiction. It's been raised,
13 I think, by my count, this is the fourth time we've
14 been here on this issue. The Ninth Circuit case of
15 Town and Country has not been overruled since then.
16 And again, the Government has filed its proof of claim
17 -- or two proofs of claim, thereby consenting to this
18 Court's jurisdiction.

19 THE COURT: All right. Thank you. Let's
20 hear the motion to stay discovery pending my ruling on
21 motion for judgment on the pleadings first.

22 MS. FOGG: I'm sorry, Your Honor. Could you
23 say that again?

24 THE COURT: Yes. Let's hear your motion to
25 stay discovery pending final resolution of motion for

AHEARN & ASSOCIATES
ahearnandassoc@comcast.net

1 judgment on the pleadings.

2 MS. FOGG: Thank you, Your Honor. So this
3 motion was brought prior to the motion to compel that
4 this Court decided during the last hearing. It's
5 continued significance is, one, it is another option to
6 the Court in terms of dealing with some of the problems
7 presented by this case. One thing I wanted to clarify
8 from when this issue was discussed in terms of the
9 motion to compel was that this Court, at that point,
10 ruled that -- you know, ordinarily, if there is a
11 dispute about jurisdiction, there are grounds to
12 potentially stay discovery so that there is not
13 prejudice to one of the parties while that
14 jurisdictional dispute is going forward.

15 In this instance, the Court said that because
16 there would be discovery -- or at least this is my
17 understanding of the Court's ruling -- is that because
18 there would be discovery with respect to claim 82, that
19 regardless of whether or not this Court or the agency
20 went about deciding claim 83, the Government would
21 still need to participate in discovery because of claim
22 82. And I just wanted to note that that is not the
23 case, because claim 82 represents a fully matured and
24 final decision by the agency that was not appealed by
25 NMTC. The only thing this Court would be deciding with

AHEARN & ASSOCIATES
ahearnandassoc@comcast.net

1 respect to claim 82 is its priority status and its
2 administration in the bankruptcy. So discovery would
3 not be necessary or allowed.

4 So there is a prejudice to the Government in
5 having to proceed with discovery while these
6 jurisdictional issues are being decided.

7 THE COURT: All right. Let me hear from
8 plaintiff's counsel.

9 MR. WILLIG: Thank you, again, Your Honor.
10 If the Government had an issue with respect to
11 producing documents or complying with discovery, the
12 time and place for that was prior to us serving them
13 with the discovery and bringing the appropriate motion
14 for either protective order or, in this instance, its
15 request for a stay.

16 We've served our discovery shortly after the
17 amended complaint was served, which I believe was
18 sometime in early June. We then gave the Government an
19 extension of time to respond to that discovery. On
20 practically the eve of its required production,
21 pursuant to this Court's order, it essentially called
22 my office and said they were only going to produce
23 documents that a claimant would get during the course
24 of an administrative hearing, period. Now, they didn't
25 bring that up to the Court beforehand or by way of a

AHEARN & ASSOCIATES
ahearnandassoc@comcast.net

1 protective order. And essentially what they're doing
2 is asking for that today, and then also saying --

3 THE COURT: But the only one you're arguing
4 right now is the overall -- is the total stay request
5 pending this now new motion for judgment on the
6 pleadings. The next motion will be the one you're
7 starting to argue.

8 MR. WILLIG: Well, again, these were issues
9 that should have been properly brought up during the
10 pretrial conferences when we're establishing the
11 deadlines for trial and before we're setting out our
12 own discovery and developing our own deposition
13 schedules for the Government's witnesses.

14 At this point, no purpose is served by
15 delaying these proceedings any further. Jurisdiction
16 has been established by this Court. The Court is the
17 proper forum to hear these claims. And delay only
18 serves to benefit the Government and act to the
19 detriment of this debtor, because no claimant -- no
20 other class of claimants is getting paid. And either
21 the Government has a basis for withholding these \$15
22 million in funds, or it does not. It shouldn't be
23 entitled to a victory simply through attrition and
24 continuing the case and continuing these deadlines
25 month after month after month, while the other parties

AHEARN & ASSOCIATES
ahearnandassoc@comcast.net

1 in this case effectively suffer.

2 This is the main asset for this case, the
3 recovery of these Medicare funds. We shouldn't put,
4 essentially, this entire case on hold while an issue
5 that has already been raised countless times by the
6 Court is heard again. So there's no reason for a stay
7 of these proceedings whatsoever.

8 THE COURT: All right. Thank you. Now let's
9 hear argument on the motion for protective order.

10 MS. FOGG: Thank you, Your Honor. I do want
11 to start by noting the issue about that we could have
12 moved for reconsideration. The initial decision on the
13 initial motion to dismiss is not --

14 THE COURT: It doesn't really matter. I
15 think you almost had to do what you did to preserve the
16 record. I understand.

17 MS. FOGG: Thank you, Your Honor. I just
18 wanted to clarify that. The motion on the protective
19 order assumes that this case proceeds as it currently
20 is and attempts to decide what discovery should occur
21 and how. Our motion relates to the legal and equitable
22 reasons why discovery should be limited to the
23 administrative record. The legal reason is that every
24 other Medicare payment dispute has been decided using
25 the administrative record. And departing from that

AHEARN & ASSOCIATES
ahearnandassoc@comcast.net

1 standard would not only be unprecedented, but it would
2 also create a significant difference between the claims
3 being heard in this court and them being heard in the
4 usual process of agency administration.

5 THE COURT: So for this motion, it's
6 important for me to get a better understanding of what
7 discovery would occur in the administrative proceeding.
8 The characterization, as I took it -- and I may be
9 mischaracterizing it -- from the plaintiff is,
10 basically, they wouldn't get any discovery in the
11 administrative proceeding, at least at this juncture.

12 MS. FOGG: It's a little bit of a difference
13 in the terms. They wouldn't get discovery, per se, but
14 think would be given the letter and the findings and
15 the supporting documentation for what the agency had
16 reviewed. So they --

17 THE COURT: Once the agency has reviewed it,
18 though. But until anything but Universe 1 has been
19 reviewed, they'd get bupkis, right?

20 MS. FOGG: They've already gotten some things
21 that are beyond the administrative record, and they
22 have gotten the findings and the supporting
23 documentation for claim 82 and for Universe 1. But
24 you're correct that they have not received anything
25 about Universes 2 through 4 because there's nothing to

AHEARN & ASSOCIATES
ahearnandassoc@comcast.net

1 produce at this time. Those are what are being worked
2 on.

3 THE COURT: Okay. Go ahead.

4 MS. FOGG: Our motion relies in part on the
5 quote from Butner v. United States, which is the
6 Supreme Court case, saying that there is no reason why
7 interest should be analyzed differently simply because
8 an interested party is involved in a bankruptcy
9 proceeding. And that is the case here. It would
10 create bad incentives for there to be more discovery,
11 more delving into the agency's processes, and
12 potentially forum shopping if they were allowed to do
13 this instead of what they would normally get if they
14 just happened to not be in bankruptcy.

15 The other issue is the equitable issue, which
16 is that NMTC is seeking civil discovery of all of these
17 issues, and also the benefits of the agency proceeding.
18 Under the normal agency review, the agency takes on a
19 burden that it would not ordinarily have to. The rule
20 is that in order to be entitled to repayment under
21 Medicare, the burden is on the claimant to demonstrate
22 their entitlement to that payment. If we were not in
23 the agency review process, that would mean that the
24 service provider would need to come forward before the
25 Court and show the basis for meeting all of the

AHEARN & ASSOCIATES
ahearnandassoc@comcast.net

1 Medicare rules and requirements, looking at the charts
2 of the patients at issue, looking at the FDA trials
3 that are going on, comparing all of those against the
4 rules that Medicare has for what is covered and what is
5 not.

6 What the agency takes on voluntarily, as a
7 burden during the normal agency review process, is to
8 go out and proactively collect those documents, cull
9 through them to the relevant parts. They hire a
10 medical staff to do that, to interpret diagnoses codes
11 and to come up with a decision that represents what
12 they have seen in that record. That would not be
13 available to them in the normal course. And that is
14 what NMTC is essentially asking for, both the benefits
15 of that process and then beyond that for their civil
16 discovery.

17 I'd also note that NMTC has not suggested any
18 plan for how that would occur. Their plan in their
19 response is to use the administrative record that has
20 already been decided to move forward. I haven't heard
21 any explanation for how else we would go about doing
22 that. If that is what they want and need to prove
23 their case, there's certainly no harm in limiting them
24 to that, and they have not identified any harm.
25 Anything that they need to prove their case, it would

AHEARN & ASSOCIATES
ahearnandassoc@comcast.net

1 not be part of the administrative record.

2 They have noted the issue of fraud. It's
3 worth explaining that the way the agency system works
4 is that when there's a credible allegation of fraud,
5 that is essentially a red flag that starts the process
6 of looking through claims for eligibility. But it gets
7 split into two separate tracks. So the OIG's office
8 actually reviews the fraud, and there is a criminal
9 investigation, an OIG investigation, going on with
10 respect to that fraud that this part of the case has
11 nothing to do with.

12 Fraud is just the thing that instigates the
13 looking into the eligibility of each of the claims, and
14 that's what we're talking about here. So that's why
15 questions about fraud and the discovery about fraud
16 would not only be irrelevant, but they would also
17 implicate a lot of privileges and other protections
18 that we would have to litigate and decide -- which we
19 would not have to litigate and decide if we were just
20 limited to the administrative record, which I believe
21 is what both parties have suggested is needed here.

22 THE COURT: All right. So but, in essence,
23 what you're saying there is if I were to deny your
24 motion overall, you'd be coming back and asking for a
25 protective order as to any requests to OIG or regarding

AHEARN & ASSOCIATES
ahearnandassoc@comcast.net

1 the fraud investigation.

2 MS. FOGG: Among other things. It would also
3 have the additional burden of -- they've asked for
4 things like email communications between the various
5 contractors and groups. That would require collecting
6 all of those email communications. And then there are
7 things like, you know, we've looked at one that was a
8 nurse listing, among her different cases that she's
9 working on, this case as one of them, and then other
10 cases that, you know, involve other areas of fraud and
11 other investigations. It would mean going through all
12 of those thousands of emails and culling out the ones
13 that are potentially relevant, not protected by the
14 attorney/client privilege, and not related to the fraud
15 or other irrelevant issues. That would time consuming,
16 and it would also require further litigation.

17 THE COURT: All right. Let me hear from
18 plaintiff.

19 MR. WILLIG: Your Honor, I'm not quite sure
20 what the Government's -- what we're asking for here is
21 the discovery that we're entitled to under the civil
22 rules and, frankly, under the rules of evidence. We're
23 not asking for two tracks saying, give us the
24 administrative record, and then give us everything that
25 we're entitled to under the civil rules. We're saying,

AHEARN & ASSOCIATES
ahearnandassoc@comcast.net

1 give us everything that supports your claims -- like we
2 do in any other type of trial -- and if you don't have
3 those documents, say so. If you do, then produce them.

4 The Government shouldn't be entitled to a
5 protective order because it believes that the record in
6 this case or the discovery in this case should be
7 limited. What they're essentially asking for is to
8 say, okay, even though this Court has jurisdiction and
9 it's going to hear this claim, we want this Court to
10 apply the rules that would be in effect if this was an
11 administrative proceeding.

12 The fact of the matter is, there is no
13 administrative proceeding pending. All we have is the
14 Government saying, we're suspending these funds. On
15 Natural Molecular's side, they're saying, we want to
16 know why you're suspending the funds and whether or not
17 that suspension is proper or not. Because if it's not
18 proper, release the funds.

19 Again, the Government is trying to make this
20 case seem much more arduous and much more complex than
21 it really is. Whether or not Natural Molecular was
22 complying with the Medicare requirements in submitting
23 its invoices, those are very triable issues. Those are
24 very provable issues. Whether or not these tests were
25 medically necessary or not, again, those are issues

AHEARN & ASSOCIATES
ahearnandassoc@comcast.net

1 that can easily be heard during the course of trial.

2 Whether or not the Government is reimbursing
3 other lab providers for this exact same type of service
4 is also very relevant to this case. Whether or not the
5 Government's motivation is simply to say, we've got a
6 lab that's down on one knee and we want to end its
7 existence and not have to pay it \$15 million, that's
8 another issue that will be explored at trial.

9 But to at this point say the Government wants
10 a protective order simply to produce documents, as
11 we've -- the Court's already seen, hundreds and
12 hundreds and hundreds of pages of unreadable
13 spreadsheets, and then say that that's what Natural
14 Molecular should be limited to is not what the rules
15 provide. The rules state that they have to come forth
16 with all of their discovery. And if they think that
17 something should be protected, we're happy to agree to
18 -- and already have agreed to -- limit communication
19 that might affect their other ongoing investigation.
20 In fact, I think we've done that informally, and an
21 order to that effect has been entered.

22 There's no further -- there's no reason to
23 take this motion for protective order and use it to
24 limit discovery. That's not what it's for, and the
25 Government has not articulated a reason why that should

AHEARN & ASSOCIATES
ahearnandassoc@comcast.net

1 be the case.

2 THE COURT: All right. Thank you. I have
3 some questions, and they sort of overlap various of the
4 motions, but mainly are germane to the abstention
5 motion, I think. But they overlap somewhat. I need a
6 better sense of just what is in -- as I understand it,
7 the Government has, in its mature claim, fully mature
8 claim, has, as to Universe 1, claimed reimbursement of
9 every dime it's paid on those reviewed claims to
10 Natural Molecular. Is that correct?

11 MS. FOGG: I think the phrasing is slightly
12 off. Universe 1 is part of claim 83.

13 THE COURT: Oh, it is.

14 MS. FOGG: Yes.

15 THE COURT: Okay. So what's -- but claim 82
16 is the fully matured one, isn't it?

17 MS. FOGG: Correct.

18 THE COURT: Okay. So I assume those claims
19 have been reviewed?

20 MS. FOGG: Yes.

21 THE COURT: Okay. But it's not in any of
22 what you call the universes.

23 MS. FOGG: That's right.

24 THE COURT: Okay. So then besides the
25 universes you're calling universes, there is a universe

AHEARN & ASSOCIATES
ahearnandassoc@comcast.net

1 that you've already reviewed all of those claims.

2 MS. FOGG: Yes. And I'm sorry for the
3 terminology. But yes, claim 82 was before this dispute
4 started, or started in earnest, had been fully
5 reviewed. There had been an agency determination that
6 was not appealed in the time frame that it would have
7 needed to be.

8 THE COURT: So it it used to be a universe,
9 but now that you've reviewed it, it's no longer a
10 universe?

11 MS. FOGG: That's right. It's outer
12 universe.

13 THE COURT: All right. Outer universe. I
14 like that.

15 MS. FOGG: Okay.

16 THE COURT: So as to the outer universe, was
17 there not a single claim that Medicare believed was
18 valid?

19 MS. FOGG: That I don't know.

20 MR. WILLIG: Our understanding is there was
21 not.

22 MS. FOGG: Okay. I believe there were not
23 any that were allowed.

24 THE COURT: Okay. So give me a flavor of why
25 they were disallowed. I mean, I know the example that

AHEARN & ASSOCIATES
ahearnandassoc@comcast.net

1 had been raised before of just, they weren't asked for
2 by the doctors or they weren't in the category that was
3 covered. But I guess I'm kind of perplexed how a
4 seemingly sophisticated entity that does this genetic
5 testing got every single one wrong and didn't make one
6 claim that was an allowable claim.

7 MS. FOGG: Well, it's done on a sampling
8 basis. So it's not that each individual claim is
9 reviewed. It is a -- there's a methodology that's been
10 developed and approved by courts where --

11 MR. DREW: Your Honor, I'm very sorry. This
12 is Richard Drew. I just want to keep us from getting
13 confused. But claim 82 is composed of, I believe, 241
14 individual claims totaling about \$66,000, whereas claim
15 83 is about the ongoing administrative proceeding that
16 involves over 100,000 claims and amounts to millions
17 and millions of dollars. So I mean, claim 82 involves
18 individual determinations for people's claims, whereas
19 claim 83 involves sampling from well over 100,000
20 claims.

21 THE COURT: All right. But my understanding
22 was claim 82 was \$8 million.

23 MR. DREW: No, no, no. Claim 82 is \$66,000,
24 Your Honor.

25 THE COURT: Oh, it is. Okay. What's the \$8

AHEARN & ASSOCIATES
ahearnandassoc@comcast.net

1 million?

2 MS. FOGG: Universe 1.

3 MR. DREW: Claim 83.

4 MS. FOGG: Claim 83.

5 THE COURT: Okay. So even though it is
6 unliquidated and might be more than that, it's at least
7 \$8 million?

8 MS. FOGG: It's that it is part of the
9 unliquidated group, which is the four universes. But
10 since this has all started, and since the filing of
11 claim 83 as an unliquidated claim, it has been -- it's
12 had its initial determination.

13 THE COURT: Okay. So it's now partially
14 liquidated. You haven't amended the claim to reflect
15 it, but --

16 MS. FOGG: That's right. But there's also,
17 potentially, appeals rights to NMTC for that. So I'm
18 not sure it can be considered final in the same way
19 that claim 82 is.

20 MR. FREEDMAN: Your Honor, this is Larry
21 Freedman, if I may, for Natural Molecular. This points
22 to the crux of the whole problem, which is NMTC has no
23 right to appeal the \$8 million, has no way to get
24 information about this, apart from what's been parceled
25 out to it, and simply -- as Mr. Willig has pointed out

AHEARN & ASSOCIATES
ahearnandassoc@comcast.net

1 -- simply wants normal, civil discovery to understand
2 whether it's entitled to the \$8 million or whether
3 there's a basis for the NMTC to keep it. And the only
4 way to do that is through the adversary proceeding,
5 that we can figure out.

6 MR. DREW: Your Honor, this is Richard Drew.
7 That's entirely false. They have the right to --

8 THE COURT: I'm glad you agree.

9 MR. DREW: They have the right to --

10 THE COURT: So let me slow you down for a
11 minute. This all started by the Court's colloquy, and
12 I really do want an answer to my question. What I'm
13 really trying to understand is, at its heart, what is
14 going to be involved in this litigation. Because one
15 of the options that really hasn't been presented as a
16 separate option that's on the table -- and certainly
17 could all be trumped in a heartbeat by a full grant of
18 the motion to withdraw the reference -- but I have the
19 jurisdiction to render a final adjudication as to the
20 claims matters, as opposed to the claim-over.

21 The claim-over, it could be referred back
22 down to me to handle everything up to trial. But
23 absent consent by the Government, I'm not going to be
24 hearing the claim-over when it actually gets to trial.
25 There's no disagreement on that jurisdictional aspect,

AHEARN & ASSOCIATES
ahearnandassoc@comcast.net

1 I don't think. And that's setting aside the
2 Government's other jurisdictional arguments and the
3 possibility of a reverse field on Town and Country and
4 all of those issues. I'm just saying, broad brush, I'm
5 trying to get to an understanding of this. I heard the
6 trial on the pure claims issues. Does it, in fact,
7 though -- would I be making rulings on the exact same
8 issues that are going to cut across the rest of the
9 field here?

10 MS. FOGG: Yes.

11 THE COURT: Okay. And what are those issues?

12 MS. FOGG: If I'm understanding the question
13 correctly --

14 THE COURT: Because what I'm still not
15 understanding is how each and every one of this
16 entity's claims could be false and wrong and not
17 payable.

18 MS. FOGG: So the claim 83, as Richard
19 pointed out, represents millions of claims that are
20 separated into four universes by chronology. They will
21 be reviewed using a sampling methodology. So if
22 they're -- once they're decided by the agency, it will
23 be on a sampling basis. And what normally happens in
24 the agency review process is then NMTC has an
25 opportunity to, you know, take issue with certain

AHEARN & ASSOCIATES
ahearnandassoc@comcast.net

1 aspects of the sampling and whether or not the ones
2 that were sampled were good samples or not. And that
3 ends up being the dispute.

4 Here, my understanding is that they are
5 asking for a complete displacement of the agency
6 process and to be able to just present to Your Honor
7 why they're entitled --

8 THE COURT: Right. But it's not answering my
9 question. My question is a factual one. It's just
10 what is the nature -- what's the specifics of the basis
11 why any of these samples were bootied out as not being
12 payable?

13 MS. FREEMAN: Do you want me to explain?

14 MS. FOGG: Sure. May I have Ms. Freeman --

15 THE COURT: Yes, please.

16 MR. FREEDMAN: Your Honor --

17 THE COURT: Counsel, for a minute, hold on.
18 I'm just trying to explain why I'm asking the question
19 so I can get a better answer to the question. One of
20 the options in front of me is abstention, but one of
21 the options that is more fully in my control is going
22 ahead with claims issues at trial. I'm trying to
23 understand what is really in play here, what's the
24 nature of the evidence of -- not all of what's
25 necessary to establish Medicare claim or a right to

AHEARN & ASSOCIATES
ahearnandassoc@comcast.net

1 repayment, but literally what's the dispute between the
2 parties, what is the nature of the reason that Medicare
3 booted these claims out.

4 MS. FREEMAN: And thank you, Your Honor, for
5 letting me explain. I think this underscores how
6 complicated this can become. Claim 82 is separate from
7 claim 83 as follows. Claim 82 is generated through
8 what's called a recovery program audit. And what that
9 means is when these claims are processed through this
10 huge system, the Medicare administrative contract or
11 system will catch claims simply through the system
12 edits that are in place.

13 The problem with those claims, and claim 82,
14 is that they might have been involving double billing.
15 They might have involved billing involving skilled
16 nursing facilities and violating the consolidated
17 billing rules. There might be other processing issues
18 that the computer system kicked out. And when the
19 computer system kicks it out, it generates a letter to
20 the plaintiff to explain, you've been overpaid. These
21 claims were paid before, but our system went back and
22 reviewed these claims and picked up these claims, and
23 we have overpaid you. Therefore, you owe us money on
24 those 241 claims which equals \$66,000.

25 Plaintiff, for whatever reason, never

AHEARN & ASSOCIATES
ahearnandassoc@comcast.net

1 appealed those initial determinations. That period has
2 expired. From the agency's perspective, that is
3 considered a final determination. And I don't -- in my
4 view, I don't see what the Court could possibly review
5 from that, because from our perspective, it is a mature
6 debt in the amount of \$66,000.

7 Claim 83, on the other hand, is a different
8 animal. That claim is a result of this ongoing program
9 integrity review, which is being conducted by
10 AdvanceMed. You might recall that name from the
11 pleadings. But that is a Medicare contractor
12 specifically reviewing all the claims that have been
13 submitted by the plaintiff from January 1, 2011,
14 through the present. It's that, what, three-year time
15 frame -- two and a half years -- my math is not adding
16 up -- but from January 1, 2011 through the present,
17 AdvanceMed had to break that down into four universes
18 to make them more manageable.

19 And what Ms. Fogg was explaining, that of
20 that claim 83, Universe 1 has been completed review
21 through acceptable sampling and testing methodologies
22 -- very, very thorough review -- and has been
23 determined that of those, I think 1,400 units that were
24 billed in that sampled universe, that these claims are
25 not covered. There are many reasons --

AHEARN & ASSOCIATES
ahearnandassoc@comcast.net

1 THE COURT: 1,400 samples or 1,400 claims
2 within Universe 1?

3 MS. FREEMAN: 1,400 units. So in other
4 words, when the AdvanceMed takes their samples, they
5 will cull the number of beneficiaries -- that's the
6 starting point. They cull from that. What are the
7 dates of service for these particular beneficiaries,
8 and they pull out that.

9 With respect to plaintiff's claims, the
10 plaintiff billed numerous line items in one claim. And
11 within the line items, there could be several units.
12 So you might have one beneficiary, and there might be
13 five separate claims that were submitted for that
14 beneficiary. But within those five claims, you might
15 have 12 line items, meaning was there a test for
16 Plavix, was there a test for beta blockers, was there a
17 a test for Warfarin, and so forth and so forth. And
18 then, depending on how the plaintiff billed it, the
19 plaintiff might apply several units to apply to a line
20 item.

21 And I realize this gets complicated --

22 THE COURT: No, that's fine. I want to hear
23 this detail. Go ahead.

24 MS. FREEMAN: So therefore, for Universe 1,
25 there were approximately 1,400 units that were billed

AHEARN & ASSOCIATES
ahearnandassoc@comcast.net

1 by the plaintiff, and in reference to 50 claims with
2 260 service items within those claims. So therefore,
3 when AdvanceMed conducted its review -- again, very
4 sophisticated and detailed statistical analysis -- it
5 then goes through the medical documentation to support
6 those claims and service items, if you will.

7 You asked what is involved in that review.
8 It requires a review to understand, well, what were the
9 diagnoses of these particular beneficiaries. Because
10 Medicare will only cover genetic testing under very
11 specific, very limited circumstances. Simply because a
12 laboratory calls something a genetic test and sends the
13 test to Medicare doesn't guarantee that it will be
14 covered. Perhaps the system might pay out on that
15 claim because the system has to work so quickly to get
16 these claims dealt with.

17 But here, given the allegations of fraud that
18 were raised, Medicare and AdvanceMed said, we need to
19 go take a look at what's been going on here. And
20 therefore, they go through the medical documentation to
21 understand, well, what kind of a genetic test was
22 applied? What were the prescriptions that this
23 beneficiary supposedly was taking? Because again,
24 Medicare has very specific line items insofar as what
25 kind of drugs can be tested for.

AHEARN & ASSOCIATES
ahearnandassoc@comcast.net

1 And then the medical review has to ask
2 itself, well, what were the diagnoses that were
3 supplied by the doctors? In some instances, we found
4 that the plaintiff had preprinted the diagnosis codes
5 on the forms. And that's a no-no in the Medicare
6 program. It's the doctor who has to indicate what the
7 diagnosis is. It's not up to a laboratory to decide
8 what the diagnosis is. Everything stems from what a
9 physician supposedly orders.

10 The concern that's been raised here is that
11 the laboratory here has been pre-inserting information,
12 and in some cases, doctors didn't even sign off on a
13 requisition that would be given to the laboratory.
14 That would be another reason on which to deny a claim,
15 if there's no physician signature or if there's no
16 intent that a physician had actually ordered a test for
17 a particular purpose. Medicare can deny the claim.

18 Those are only the regulatory criteria
19 regarding physician's signatures. Did the physician
20 intend -- did a physician order the test, versus the
21 physician's secretary in the clinic? There are very
22 specific regulatory criteria that apply to
23 laboratories, but then you add on top of that, very
24 specific coverage criteria that applies to genetic
25 testing in question.

AHEARN & ASSOCIATES
ahearnandassoc@comcast.net

1 To begin, as a general rule, Medicare does
2 not cover screening tests. And that's what we're
3 finding with a lot of these -- well, so far, in
4 Universe 1, we have found that with 100 percent of the
5 claims that were reviewed, there was no diagnostic
6 testing. Instead, either signatures didn't appear, or
7 diagnoses codes were not appropriate. Whatever
8 diagnosis codes appeared on these preprinted forms that
9 were supplied by plaintiff, it did not match the actual
10 diagnosis of the patient itself. Or there were -- if a
11 patient was on Warfarin, for example, there are very
12 specific circumstances under which Medicare would ever
13 pay. For example, Medicare will only cover Warfarin
14 testing if a patient was on it for less than five days
15 and if the patient was involved in a clinical trial and
16 it was used in the active managed care of the patient.

17 AdvanceMed found these things weren't
18 happening with these patients. And therefore, the
19 concern that it's caused us is that this is either
20 screening, Medicare screening -- which Medicare does
21 not cover -- or there's simply no supporting
22 documentation whatsoever.

23 THE COURT: Screening meaning it isn't
24 specific to anything that's been diagnosed yet?

25 MS. FREEMAN: That's correct. For example,

AHEARN & ASSOCIATES
ahearnandassoc@comcast.net

1 Medicare would not cover a beneficiary who's curious to
2 know whether they might have a predisposition to a
3 certain sensitivity. There has to be signs and
4 symptoms of a particular covered benefit. I hope that
5 makes sense.

6 THE COURT: Yes, it does make sense. So for
7 instance, if a physician thought, well, maybe it would
8 be appropriate to prescribe X for this patient, but I'm
9 leery of doing that because it's a dangerous drug. If
10 he or she has X indicators in their genetic makeup, we
11 better have some genetic testing for that. Would that
12 be appropriate or not appropriate where they haven't
13 prescribe the drug yet?

14 MS. FREEMAN: As a general rule, no, that
15 would not be covered by Medicare.

16 THE COURT: Okay. It may be medically a good
17 thing to do, but it wouldn't be covered by Medicare.

18 MS. FREEMAN: Perhaps. But what we found in
19 a lot of medical records we have been reviewing,
20 doctors didn't even review the results with their
21 patients.

22 THE COURT: So for one of these enumerated
23 reasons, but not always the same reason, every single
24 one of these claims that was tested was bad.

25 MS. FREEMAN: Correct. Or we found that -- I

AHEARN & ASSOCIATES
ahearnandassoc@comcast.net

1 don't know if the word "bad" is the right word, but --

2 THE COURT: Not covered for some reason.

3 MS. FREEMAN: Not covered, not appropriate,
4 not reasonable and necessary. All of those phrases
5 would apply to these claims. And then to some extent,
6 there were signatures missing or preprinted diagnosis
7 codes. That raises a real certain.

8 THE COURT: Okay. And then are some of the
9 those problems fixable, potentially? If the office
10 assistant signed it when the doctor should have, but
11 the doctor fully would have prescribed that, is that a
12 fixable problem? They just need more documentation?
13 Or is it too late, once it's --

14 MS. FREEMAN: No. Yeah, it would be
15 considered too late. It is not fixable. Because the
16 claim has to be -- it has to be reliable, and it has to
17 be honest when it goes into the system. It has to have
18 some integrity underlying it so that it can be
19 supported by the medical document.

20 THE COURT: So just from a -- regardless of
21 whether there was fraud involved, basically from an
22 incompetent standpoint in making Medicare claims, this
23 debtor, in Medicare's eyes, is as bad as it could be.

24 MS. FREEMAN: Correct.

25 THE COURT: All right.

AHEARN & ASSOCIATES
ahearnandassoc@comcast.net

1 MR. FREEDMAN: Your Honor, this is Larry
2 Freedman. Lots was covered there, but if I could just
3 make one simple point, responding to Ms. Freeman.
4 What's been reviewed by AdvanceMed was 30 patients, as
5 I understand it. I read the report. And about half --
6 and they asked for medical records from doctors to make
7 this review. There is very little, if anything,
8 alleged that the lab didn't do correctly. They looked
9 for medical records. About half of these denials were
10 simply because doctors' offices themselves didn't
11 provide the records, and they didn't have, in their
12 view, documentation.

13 So there are -- all we want is to be able to
14 test this, understand the claims were proper or not, if
15 the lab did anything wrong or not, because of the
16 substantial amount of money at issue. Your questions
17 were right. What would this involve. And there simply
18 isn't going to be another way to go through it, besides
19 to get the information from CMS and for us all to
20 figure out, through experts or other standard trial
21 processes or pretrial processes, how to figure out
22 these universes.

23 THE COURT: All right. Thank you. Okay. So
24 back to the motions. I will try and rule on the two
25 stay motions as soon as I can. It may take a little

AHEARN & ASSOCIATES
ahearnandassoc@comcast.net

1 longer on the abstention and the renewed motion for
2 dismissal on the pleadings. I'm cognizant of the fact
3 that the rug could be totally pulled out from under me
4 and then may not even partially sent back down to me --
5 there's a range of options -- in the motion pending in
6 front of Judge Lasnik, including a second redundant
7 motion to dismiss in front of him. So in some ways,
8 I'm not sure who's going to rule first. It all might
9 get mooted. But I will get to it as soon as I can.

10 But in the meantime, since I have not granted
11 any kind of stay, there is no stay in effect of
12 discovery. So let me at least caution the parties of
13 that. I will try and rule promptly. And I'm not going
14 to make any predetermination of any non-compliance with
15 discovery requests as to what I would do with those if
16 they get back in front of me during this hiatus where I
17 haven't ruled on these latest motions for stay or for
18 protective order. But I haven't ruled until I've
19 ruled. So the normal discovery rules are still in
20 effect until I rule on either or both of those motions.

21 So again, I will let both sets of counsel
22 know as soon as I'm ready to rule on any of the four
23 motions.

24 Thank you.

25 MS. FOGG: Thank you, Your Honor.

AHEARN & ASSOCIATES
ahearnandassoc@comcast.net